Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WATERMAN STEAMSHIP COMPANY,
Petitioner,

-against-

WEEKS MARINE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petition for a Writ of Certiorari Should be Granted to Clarify if a Shipowner's Right to *Ryan* Indemnity Against a Negligent, Non-Employing Stevedore Survived the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act?

2. Whether the Petition for a Writ of Certiorari Should be Granted Because the Second Circuit's Decision, Concluding that the *Ryan* Indemnity Doctrine is Only Applicable to No-Fault Liability Cases, Conflicts with Decisions of This Court and Other Courts of Appeal?

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JURISDICTION

The United States District Court for the Eastern District of New York exercised jurisdiction in this case involving a breach of a maritime contract under 28 U.S.C. § 1333. The United States Court of Appeals for the Second Circuit had jurisdiction to hear the appeal from the District Court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals entered an order affirming the district court's judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Waterman Steamship Company ("Waterman"), asks this Court to grant this Petition for Writ of Certiorari to consider the significant issues involving the viability and scope of the *Ryan* Indemnity Doctrine. As a non-employing stevedore, Weeks Marine, Inc. ("Weeks") is not covered by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) and should not be immunized from its negligence under a workers' compensation scheme into which Weeks has not made payments. Further, because the stevedore owes a

warranty of workmanlike performance, the purpose for *Ryan* indemnity being that an innocent shipowner not be required to suffer as a result of a stevedore's breach of this warranty still exists in the wake of the 1972 Amendments to the LHWCA. Consequently, Waterman should receive indemnity for litigation costs and fees that Waterman bore as a result of Weeks' breach of its warranty of workmanlike performance. This Court should resolve the split among the circuits on the issue of whether *Ryan* indemnity is limited to situations involving no-fault liability or extends to actions sounding in negligence.

A. Damian Lubrano Brings a Personal Injury Suit Alleging Negligence by Waterman Steamship Company and Weeks Marine Inc.

On February 24, 1994, Damian Lubrano ("Lubrano"), an employee of American Stevedoring ("American"), was loading cargo onto a barge owned by Waterman. Waterman contracted with Weeks for the rental of a crane for use during the loading. While the cargo was being loaded, a piece of ice fell from this crane and struck Lubrano on the left wrist and forearm. After recovering compensation benefits from his employer according to the LHWCA, Lubrano brought suit against Waterman and Weeks, alleging that their negligence caused his injuries. (App., *infra*, A12). A jury found that Waterman was not negligent during the loading of cargo and that Lubrano's injuries were caused by the negligence of both American and Weeks. (App., *infra*, A2).

B. Innocent of any Negligence, Waterman Seeks to Recover Litigation Costs and Fees from Weeks, but the District Court Denies Waterman's Indemnification Claim.

After being found innocent of negligence, Waterman sought to recover litigation expenses from Weeks under *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). The District Court denied Waterman's cross-claim for indemnification relying upon Second Circuit precedent providing that *Ryan* indemnity is only appropriate where the shipowner has been exposed to liability without fault. The district court concluded that *Ryan* indemnity was not available in this case because Lubrano sought to hold Waterman liable under a theory of negligence. (App., *infra*, A8-9).

C. The Second Circuit Court of Appeals Affirms the District Court's Denial of Waterman's Indemnification Claim.

In a published opinion, the Second Circuit affirmed the District Court's judgment, holding that *Ryan* indemnity was only appropriate in cases involving no-fault liability. (App., *infra*, A14, A22, *citing Navieros Oceanikos, S.A. v. S.T. Mobil Trader*, 554 F.2d 43, 44-47 (2d Cir. 1977)). Moreover, the Second Circuit expanded on *Navieros Oceanikos* by holding that the *Ryan* Indemnity Doctrine was no longer viable in cases concerning longshoremen. The court reasoned that the impetus for *Ryan* indemnity no longer existed because the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA) eliminated the shipowner's strict liability under the doctrine of unseaworthiness and because innocent shipowners could seek contribution from a negligent

non-employing stevedore in lieu of indemnity. (App., *infra*, A25). The Second Circuit concluded that the lack of strict liability and availability of contribution "made it less appropriate for courts to imply terms of indemnification" in the contract between shipowner and stevedore. (App., *infra*, A26). Consequently, the court immunized Weeks from liability according to the 1972 Amendments to the LHWCA, even though Weeks, a non-employing stevedore, was not covered by the LHWCA and had not paid compensation benefits for Lubrano.

REASONS FOR GRANTING THE PETITION

The Petition for Writ of Certiorari should be granted because the decision of the Second Circuit is inconsistent with federal law and directly conflicts with decisions of this Court and the other courts of appeals on important issues. The Second Circuit's decision denies an innocent shipowner indemnity as to a negligent stevedore – even though the longshoreman's injuries and resulting damages were a direct result of the stevedore's breach of an implied warranty of workmanlike performance. Although the Second Circuit reasoned that the changing relationships between longshoremen, stevedores, and shipowners demands such a result, the denial of indemnity against a non-employing stevedore is not supported by the plain language of the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, nor this Court's precedents.

Furthermore, the Second Circuit also improperly limited such indemnity to cases involving no-fault liability, contrary to authority from this Court that has been followed by other courts of appeals. The issues presented in this Petition are particularly noteworthy because under the Second Circuit's decision

innocent parties will be forced to bear the costs of defending personal injury suits routinely brought by injured longshoremen seeking to recover damages in excess of workers' compensation payments. This Petition for Writ of Certiorari should be granted to clarify the continuing viability of the *Ryan* Indemnity Doctrine and to promote uniformity in decisions between the courts of appeal.

POINT ONE **The Petition for Writ of Certiorari Should be Granted to Clarify if a Shipowner's Right to *Ryan* Indemnity Against a Negligent, Non-Employing Stevedore Survives the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act.**

This Petition for Writ of Certiorari should be granted to review the Second Circuit's conclusion that this Court's opinion in *Ryan Stevedoring, Co. v. Pan-Atlantic Steamship Corp.* is no longer viable case law. The Second Circuit's decision is incorrect for numerous reasons. First, the Second Circuit's decision overreaches the remedial nature of the 1972 amendments to the LHWCA and is inconsistent with this Court's interpretation of the 1972 amendments. Although the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act ("LHWCA") prohibits shipowners from suing a stevedore who employed the injured longshoreman, the plain language of the Amendments does not prohibit shipowners from seeking indemnity from a stevedore who was not the injured longshoreman's employer ("non-employing stevedore"). Second, *Ryan* indemnity is necessary in personal injury cases to avoid unjust results. Under the Second Circuit's holding, Waterman, although innocent of any wrongdoing, cannot recover litigation expenses from Weeks – the party whose

negligence did cause Lubrano's injuries. Finally, the Second Circuit's denial of indemnity does not deter Weeks – and other stevedores – from creating unsafe work environments, which stevedores are in the best position to prevent and remedy.

A. History of the Ryan Indemnity Doctrine

The Ryan Indemnity Doctrine evolved over the past century in response to the hazardous nature of maritime work. In 1924, Congress passed the Longshoremen and Harbor Workers' Compensation Act .[1] 33 U.S.C. §901, et. seq. This act created a workers' compensation scheme for longshoremen and harbor workers, providing certain compensation for the injury or death of these workers without regard to fault, while limiting an employers' liability to a determinative amount that could be absorbed by the shipping industry and its clients. *Ryan Stevedoring Co., v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 129 (1956); *United States v. Bender Welding & Mach. Co.*, 558 F.2d 761, 763-64 (5th Cir. 1977). After the passage of the LHWCA, a longshoremen injured on a ship while loading or unloading cargo could still bring a third-party suit against the shipowner for negligence. 33 U.S.C. § 905.

In 1946, this Court expanded the remedies available to longshoremen for injuries suffered as a result of a defect or dangerous condition of a ship. In *Seas Shipping Co., v. Sieracki*, 328 U.S. 85 (1946), this Court extended the traditional obligation of seaworthiness – owed by a shipowner to a seaman – to longshoremen injured while working on a ship. In that

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[1] This Title was later changed in 1984 to the Longshore and Harbor Workers' Compensation Act. Sept. 28, 1984, Pub.L 98-426, §27 (d)(1), 98 Stat. 1654.

case, Sieracki, an employee of a stevedoring company, was loading cargo on a vessel when a shackle broke and a ten-ton boom fell and injured him. Sieracki sued the shipowner and the manufacturer of the shackle for negligence. The district court held that the shipowner was not negligent because it had no duty to test the shackle after installation. *Id.* at 87. The court of appeal reversed, finding that Sieracki should recover from the shipowner based upon the ship's unseaworthiness. *Id.* at 88. This Court affirmed the decision of the court of appeals and held that shipowners owe a duty of seaworthiness to seamen as well as to longshoremen who may work on the ship while it is at dock. Although the duty of seaworthiness often arises from the seaman's contract with the shipowner and no contract existed in *Sieracki*, this Court reasoned that equity demanded that a shipowner, who was in a better position to do so, absorb the costs of hazardous marine service and distribute the loss in the shipping community which receives the benefit of this service. Thus, a shipowner became strictly liable for a longshoreman's injury or death caused by a dangerous or defective condition aboard the vessel. *Id.* at 93-94.

Until 1952, a shipowner held liable to an injured longshoremen generally sought indemnity or contribution from the negligent stevedore who created the unseaworthy condition. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), this Court barred a shipowner's recovery for contribution against a negligent stevedore for damages paid to a longshoreman injured while making on-board repairs. *Id.* at 283. This Court concluded that in light of the delicate balance Congress struck between the parties in enacting the LHWCA, "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." *Id.* at 285. Consequently, *Halcyon* required an innocent shipowner to pay all damages arising from

a longshoreman's injuries without any hope of contribution from the negligent stevedore who actually caused the longshoreman's injuries.

The cumulative effect of the LHWCA, *Sieracki*, and *Halcyon* placed shipowners in an "unenviable position." *See Fairmont Shipping Corp. v. Chevron Int'l. Oil Co.*, 511 F.2d 1252, 1255 (2d Cir.), *cert. denied*, 423 U.S. 838 (1975). Shipowners became strictly liable for any injuries suffered by longshoremen while working on their ships even if the injuries were caused by the negligence of a stevedore. Yet the shipowner could not recover from the negligent stevedore, whose liability was limited by the LHWCA.

This is exactly what occurred in the case of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). Ryan Stevedoring contracted to provide stevedoring service to Pan-Atlantic's ship, the S.S. Canton. While loading rolls of pulpboard onto the ship in South Carolina, Ryan employees failed to sufficiently secure the rolls. When the ship later docked in Brooklyn, a longshoreman, also employed by Ryan, was injured during unloading when a 3,200 pound roll of pulpboard broke loose and violently struck his leg. *Id.* at 126. The injured longshoreman recovered under the LWHCA and then sued the shipowner for breach of the warranty of seaworthiness under *Sieracki*.

The *Ryan* Court concluded that the shipowner did have a right to indemnity against the negligent stevedore. The injuries suffered by the longshoremen resulted solely from the stevedore's negligence in not securing the rolls of pulpwood in a "reasonably safe manner." *Id.* at 134. By its negligence, the stevedore breached an implicit warranty of workmanlike performance, forming the essence of the contract between

shipowner and stevedore. *Id.* at 133-34. Consequently, the shipowner was held to have a contractual right to indemnity against a stevedore for "foreseeable damages" resulting to the shipowner from the stevedore's improper performance. *Id.* at 129.

This Court also determined that allowing a shipowner indemnity against a negligent stevedore did not violate the LHWCA or *Halcyon* because the Act did not relieve the stevedore from fulfilling its contractual duty owed to the shipowner to properly load the cargo. *Id.* at 130-31. This contractual warranty and the resulting right to indemnity for its breach exists regardless whether the negligent stevedore is or is not the employer of the injured longshoreman. *Id.* at 131.

By allowing shipowners a right of indemnity against negligent stevedores, this Court sought to decrease the dangerousness of longshore work by making stevedores responsible for competently loading and unloading ships since the stevedore is in the best position to avoid accidents during cargo operations. *See Italia Societa v. Oregon Stevedoring Co.* 376 U.S. 315, 322-23 (1964) ("The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedore company."). Punishing the negligent stevedore through indemnification would encourage stevedores to perform their duties in a reasonably safe manner.

In 1958, this Court clarified that *Ryan* indemnity is not limited to cases involving a shipowner's strict liability for unseaworthiness. In *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958), a piece of wood fell from a winch shelter and struck a longshoreman in the head while he was unloading the ship pursuant to a contract between the

stevedore and the shipowner. Although the temporary winch shelter was left standing during the sea voyage from New York to Boston, neither the shipowner nor the stevedore examined the structure before commencing unloading of the ship. *Id.* at 566-67. When the longshoremen sued the shipowner on claims of negligence and unseaworthiness, the jury found that the ship was seaworthy but that both the shipowner and the stevedore were negligent. *Id.* at 565. As in *Ryan*, this Court found that the stevedore violated its contractual duty to the shipowner to both handle the cargo and to use equipment in a reasonably safe manner. *Id.* at 567. Finally, the jury finding that the shipowner was "guilty of some act of negligence" did not automatically preclude indemnity under *Ryan*. *Id.* at 568. In fact, an application of the theories of active, passive, primary, or secondary negligence is inappropriate to contractually-based indemnity. *Id.* at 569, *citing Ryan*, 350 U.S. at 132-33. By allowing indemnification in *Weyerhaeuser*, this Court determined that *Ryan* indemnity was also available to shipowners even if they were not strictly liable for the longshoremen's injuries.

In 1972, Congress amended the LWHCA with the intent to eliminate the triangular liability between injured longshoremen, longshore employer, and the shipowner. Pub. L. 92-576, 86 Stat. 251 (1972), amending 33 U.S.C. §§ 901-950. The Amendments provided:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to

> the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

33 U.S.C. § 905(b). By eliminating the shipowner's duty of seaworthiness to longshoremen, longshoremen could no longer recover damages from innocent shipowners and shipowners would no longer seek indemnity from the negligent longshore employer. As a trade-off, longshore employers would then pay increased compensation benefits in lieu of damages payed to indemnify shipowners. *Director, Off. of Workers' Compensation Programs, U.S. Dept. of Labor v. Perini N. River Assoc.*, 459 U.S. 297, 312 (1983), *citing* S. Rep. No. 92-1125 at 1 (1972) *and* H. Rep. No. 92-1441 (1972). The 1972 amendments did not discuss the continuing viability of Ryan indemnity as against non-employing stevedores like Weeks. *See* H. Rep. 92-1441; S. Rep. No. 92-1125. The 1972 amendments only applied to parties who were covered by the LHWCA – employing stevedores who were protected from paying damages in addition to the increased compensation benefits.

B. The Second Circuit Concluded that the 1972 Amendments Abrogated Ryan Indemnity in Cases Involving Negligent Non-Employing Stevedores.

In the instant case, Lubrano, a longshoreman, sued Waterman for negligence. Lubrano was injured while loading Waterman's barge when a block of ice fell from a crane owned by Weeks. A jury found that Waterman was not negligent and

that Weeks' negligence was the sole cause of Lubrano's injury. When Waterman sought to recover its litigation expenses from Weeks, the district court denied indemnification, holding that *Ryan* indemnity was not applicable to suits alleging fault-based liability. (App., *infra*, A8-9).

After discussing the history of the LHWCA and this Court's opinions in *Sieracki*, *Halcyon*, and *Ryan*, the Second Circuit affirmed the district court's denial of indemnification concluding that the purpose for construing a contract between a stevedore and a shipowner to include an implicit duty of indemnity by the stevedore no longer existed in the wake of the 1972 amendments. (App., *infra*, A25). Because shipowners are no longer strictly liable to a longshoremen under the seaworthiness doctrine and shipowners can now seek contribution from non-employer stevedores that are joint-tortfeasors, the Second Circuit reasoned that it was "less likely that shipowners and non-employing stevedores would have chosen – had they considered the matter – to contract for indemnification." The court also reasoned that "...these changes made it less appropriate for courts to imply terms of indemnification." (App., *infra*, A26). The Second Circuit held that in the absence of an express indemnification clause to the contrary, the contract between a shipowner and non-employing stevedore does not obligate the stevedore to indemnify the shipowner in an action by an injured longshoreman. (App., *infra*, A28).

C. The Second Circuit Decision Overreaches the Remedial 1972 Amendments by Abrogating Ryan Indemnity as to Non-Employing Stevedores.

The Second Circuit employed judicial activism in expanding the 1972 Amendments beyond their plain language to prohibit indemnity against non-employing stevedores, despite the fact that the LHWCA only immunizes the "employer" of the injured party from liability for indemnity. The 1972 amendments provide in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

33 U.S.C. § 905(b). This Court has stated "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germaine*, 503 U.S. 249, 253-54 (1992). Thus, when the words of a statute are unambiguous "judicial inquiry is complete." *Id.* at 254. The Second Circuit decision conceded that the 1972 Amendments did not "speak directly" to the facts in this case and that the Amendments did not directly abrogate *Ryan* indemnity against non-employing stevedores. (App., *infra*, A19). By using the term "employer," Congress expressly

limited the 1972 Amendments to longshore employers and excluded non-employing stevedores, such as Weeks. If Congress had indeed intended to completely overrule *Ryan* indemnity as to all longshore parties, Congress could have expressly eliminated a cause of action for indemnity against non-employing stevedores. The language of the 1972 Amendments clearly only immunizes the employer of the injured party. Nonetheless, the Second Circuit ignored the plain language of the statute and concluded that *Ryan* indemnity was no longer viable after the elimination of the longshoreman's ability to sue the shipowner for breach of the warranty of seaworthiness.

Moreover, the Second Circuit's decision does not comport with the remedial nature of the 1972 amendments. As discussed by this Court in *Cooper*, Congress intended to prevent circuitous liability, circumventing the LHWCA. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 fn. 6 (1974). Under *Ryan*, a longshore employer was forced to indemnify a shipowner for damages the shipowner paid to an injured longshoremen in addition to the employer's payment of workers' compensation according to the LHWCA. *Id.* at fn. 6. The impetus for enacting the 1972 amendments is not implicated by the present facts because Weeks is not an employing stevedore within the purview of the LHWCA. Thus, the Second Circuit's decision barring indemnity as to non-employing stevedores is not supported by the congressional intent in enacting the LHWCA or in amending the Act in 1972.

Finally, the Second Circuit's opinion precluding indemnity in the absence of an express agreement is incongruous. (App., *infra*, A28). On the one hand, the court interprets the scope of the 1972 Amendments to the LWHCA as covering non-employing stevedores, and on the other ignores the plain language of the statute precluding indemnification

agreements between shipowners and stevedores. 33 U.S.C. § 905. In other words, the court is effectively re-writing the statute, writing in a provision precluding indemnity actions by shipowners against non-employing stevedores, and writing out the provision prohibiting express agreements of indemnification. Although the court of appeal's decision indicates that shipowners and non-employing stevedores can expressly agree to indemnification, it fails to explain why such an agreement would be enforceable under the LWHCA. If such an express agreement would be enforceable because the 1972 Amendments do not apply then those amendments cannot be the basis for eliminating the implied indemnity created by this Court in *Ryan*.

D. The Second Circuit's Decision is Inconsistent with this Court's Interpretation of the 1972 Amendments as Applying Only to Indemnity Claims Against Employing Stevedores who are Protected by the Longshoremen and Harbor Workers' Compensation Act.

The Second Circuit's decision is inconsistent with this Court's interpretation of the 1972 Amendments and the continuing viability of *Ryan*. In *Cooper Stevedoring*, this Court stated:

> The intent and effect of this amendment were to overrule this Court's decisions in *Seas Shipping Co. v. Sieracki* and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp*, insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain

> an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer.

Cooper Stevedoring, supra, 417 U.S. at 113 (citations omitted). This language indicates that this Court only considered *Ryan* to be partially abrogated by the 1972 amendments. *See Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 365 fn.5 (6th Cir. 1986), *cert. denied*, 479 U.S. 849 (1986) (holding Ryan and progeny to be valid precedent in cases involving shipowner's indemnity action against a non-employing stevedore for injuries sustained by ship employee – 1972 amendments applied only to employing stevedores).

Contrary to this Court's interpretation and that of other courts of appeal, the Second Circuit concluded that the 1972 amendments effectively abrogated *Ryan* by redefining the relationships between stevedores, shipowners, and longshoremen. By its decision, the Second Circuit presumes that the 1972 amendments and this Court's decision in *Cooper* abrogated *Ryan*, even though this Court in *Cooper* construed the 1972 amendments as only affecting indemnity claims against employing stevedores, covered by the LWHCA. Such an interpretation would allow Weeks to benefit from a compensation scheme that immunizes the employing stevedore in exchange for the payment of compensation benefits, even though Weeks did not pay compensation benefits to Lubrano. If the *Ryan* Indemnity Doctrine is no longer applicable to even those cases involving non-employing stevedores who are unaffected by the LHWCA and the 1972 amendments to the LHWCA, this Court – and not an inferior court – should determine that the equitable principles requiring a negligent stevedore to reimburse an innocent shipowner for losses suffered no longer prevail.

E. As an Innocent Party, Waterman is Entitled to Indemnification for Foreseeable Damages Caused by Week's Breach of Warranty of Workmanlike Performance.

The stevedore's warranty of workmanlike performance clearly survived the 1972 Amendments. This Court has expressly held that the 1972 Amendments did not "disturb the contractual undertaking of the stevedore nor the rightful expectation of the vessel that the stevedore would perform his task properly without supervision by the ship." *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 170 (1981). Litigation expenses incurred defending against suits brought by longshoremen injured by a stevedore's negligence are also foreseeable damages recoverable in an indemnity suit pursuant to *Ryan*. *See Massa v. C.A. Venezuelan Navigacion*, 332 F.2d 779 (2d Cir. 1964). In this case, Weeks owed Waterman a warranty of workmanlike performance in providing and operating crane equipment during the unloading of Waterman's barge, and Waterman should receive indemnity for all foreseeable damages due to that breach.

In addition to the continuing existence of a stevedore's warranty of workmanlike performance, a stevedore's implicit duty to indemnify a shipowner for damages caused by its breach of warranty also survived the 1972 Amendments. Notwithstanding the 1972 Amendments' abrogation of the seaworthiness doctrine, *Ryan* indemnity is still necessary to protect shipowners from damages caused by a stevedore's breach of its warranty of workmanlike performance. Although no longer strictly liable for damages, a shipowner who successfully defends a suit involving injuries caused by a stevedore's negligence still faces out-of-pocket expenses such

as litigation costs and fees, notwithstanding its innocence. In *Garracino v. Luckenbach Steamship Co.*, 333 F.2d 646, 648 (2d Cir. 1964), the Second Circuit held that a shipowner could recover attorneys' fees and expenses even if the shipowner is exonerated from fault or unseaworthiness. *accord, Campbell Industries, Inc. v. Offshore Logistics Int'l, Inc.*, 816 F.2d 1401, 1406 (9th Cir. 1987). Such fees are awarded on the theory that the indemnitee bore a burden properly belonging to the indemnitor. *Cooper v. Loper*, 923 F.2d 1045, 1051 (3d. Cir. 1991) (holding that district court erred in not awarding attorney's fees to indemnitees in an admiralty matter). As in *Garracino* and *Cooper*, Waterman still suffered damages that Weeks – the negligent party – should pay. While Waterman successfully defended the main action, it has suffered loss, in the form of attorney's fees and expenses in the defense caused by the actions of Weeks. Such a loss is and should be recoverable through indemnity. Because Weeks breached its warranty of workmanlike performance by negligently causing Lubrano's injuries, (App., *infra*, A2), Waterman should not be forced to pay litigation expenses in defense of a suit arising from Weeks' breach of contract.

Additionally, *Ryan* indemnity has continued viability beyond the facts in this case, notwithstanding the abrogation of the seaworthiness doctrine. Under the Jones Act, an injured seaman can sue the employing shipowner for negligence, notwithstanding the fact that the seaman's injuries were solely caused by the negligence of a non-employing stevedore or wharfinger. *See Oglebay Norton Company v. CSX Corp.*, 788 F.2d 361, 367 (6th Cir.), *cert. denied*, 479 U.S. 849 (1986) (seaman brought a personal injury suit against employing shipowner after seaman fell off a dark, slippery dock that was negligently maintained by dockowner); *Cooper v. Loper*, 923 F.2d 1045, 1047 (3d. Cir. 1991) (seaman brought personal

injury suit against employing shipowner after stevedore employees failed to catch a bucket of fish, which then struck seaman in head). As is apparent from *Oglebay* and *Cooper*, an innocent shipowner faces potential liability in suits brought under the Jones Act for damages caused by a stevedore's or dockowner's breach of its warranty of workmanlike performance. Thus, the 1972 Amendments' abrogation of the seaworthiness doctrine does not preclude a longshoreman or seaman from suing an innocent shipowner for injuries caused by a non-employing stevedore, and *Ryan* indemnity is necessary to protect an innocent shipowner from bearing the cost of this litigation.

Moreover, allowing Waterman to recover litigation expenses would effectuate the purpose of indemnification. As stated by this Court:

> [L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964). In the instant case, requiring Weeks to indemnify Waterman for litigation costs would deter Weeks from breaching its duty of workmanlike performance in the future. This deterrence would foster a safer work environment for longshoremen and seamen.

Finally, a shipowner's ability to seek contribution from a non-employing stevedore should not preclude Waterman's

right to indemnification in this case. This Court has held that a shipowner can seek contribution for contractual damages suffered as a result of a stevedore's breach of workmanlike conduct. *Cooper Stevedoring Inc. v. Fritz Kopeke, Inc.*, 417 U.S. 106, 113 (1974). But this remedy between joint-tortfeasors does not provide a basis for recovery for shipowners such as Waterman. Contribution also does not contemplate attorneys fees. *See Sea-Land Service, Inc. v. Crescent Towing and Salvaging, Co.*, 42 F.3d 960, 963 (5th Cir. 1995) ("where contribution is appropriate, an award of attorneys' fees is not."). Accordingly, a remedy for contribution is not always available to shipowners, especially those who were innocent of any negligence, and should, therefore, not be the basis to preclude recovery under an indemnity theory.

POINT TWO **The Petition for Writ of Certiorari Should be Granted Because the Second Circuit's Conclusion that the *Ryan* Indemnity Doctrine is Only Applicable to No-Fault Liability Cases Conflicts with Decisions of This Court and Other Courts of Appeals.**

This Petition for Writ of Certiorari should also be granted to promote uniformity of decision regarding the scope of *Ryan* indemnity. The Second Circuit has held that *Ryan* indemnity only applies to cases between involving no-fault liability. The Ninth Circuit has also generally limited *Ryan* indemnity to cases involving no-fault liability. Other courts of appeals have followed this Court's holding that *Ryan* indemnity is equally applicable to claims alleging fault-based liability. The Second and Ninth Circuits' limitation of *Ryan* indemnity to

cases involving no-fault liability also contravenes the purpose of indemnity and ignores the necessity of *Ryan* indemnity in fault-based liability cases to avoid unjust results.

A. The Second Circuit Concluded that the Ryan Indemnity Doctrine Only Applies to Cases Involving No-Fault Liability.

In its decision, the Second Circuit held that Waterman was not entitled to indemnity because *Ryan* indemnity applied only in cases where a stevedore rendered its services to a shipowner in a way that exposed the shipowner to strict liability. (App., *infra*, A14, A22, *citing Navieros Oceanikos, S.A. v. S.T. Mobil Trader*, 554 F.2d 43, 44-47 (2d Cir. 1977)). The Second Circuit based this conclusion on the legislative history of the 1972 Amendments. In passing these Amendments, Congress expressed a general belief that by eliminating a shipowner's strict liability under the seaworthiness doctrine, the amendments removed the need for *Ryan* indemnification altogether. (App., *infra*, A21, *citing* H.R. Rep. No. 92-1441 (1972)). Yet the Second Circuit also conceded:

> ...such a view does not entirely comport either with the Supreme Court's rationale for creating Ryan indemnity or with later Supreme Court cases that developed the Ryan doctrine, albeit before the 1972 amendments. On their face, Ryan and its early progeny do not reflect the premised essential link between the shipowner's warranty of seaworthiness to the longshoreman and its right of indemnification against the stevedore.

(App., *infra,* A22-23). Nonetheless, stressing the dramatic change in the legal context of the relationship between the shipowner and the non-employing stevedore since *Ryan*, the Second Circuit concluded that such an "essential link" was a requisite to obtaining Ryan indemnity. (App., *infra,* A23, A25).

B. The Second Circuit's Decision is Inconsistent with This Court's Allowance of *Ryan* Indemnity in the Negligence Case of *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*

The Second Circuit's decision is inconsistent with this Court's application of *Ryan* indemnity to a negligence case alleging no-fault liability. *See Weyerhaeuser S.S. Co. v. Nacirema Operating Co.,* 355 U.S. 563 (1958). In that case, a longshoreman was unloading Weyerhaeuser's ship when a piece of wood fell from a temporary winch shelter and struck the worker. The longshoremen brought suit against Weyerhaeuser on claims of negligence and unseaworthiness. A jury found that the ship was seaworthy and that Weyerhaeuser was negligent. *Id.* at 564. Despite an absence of strict liability, this Court held that Weyerhaeuser was eligible for indemnification for damages it paid to the longshoreman because the stevedore's breach of its warranty of workmanlike performance caused the longshoreman's injury. *Id.* at 567-68. The Second Circuit has ignored this clear precedent in limiting *Ryan* indemnity to cases involving no-fault liability.

C. The Second Circuit Opinion is Inconsistent with Decisions of Other Courts of Appeal that Have Consistently Applied Ryan Indemnity to Negligence Cases.

The Second Circuit decision limiting *Ryan* indemnity to cases involving no-fault liability also creates an irreconciable split with decisions from other circuits. In accordance with this Court's decision in *Weyerhaeuser,* the Third, Fourth, and Sixth Circuits have continued to allow *Ryan* indemnity in cases involving recovery for negligence.

For example, the Sixth Circuit has allowed indemnification under *Ryan* in cases involving negligence claims under the Jones Act. In *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361 (6th Cir. 1986), *cert. denied*, 479 U.S. 849 (1986), a ship employee fell from a dark, coal-strewn dock and was crushed by the 572-foot steamer. The decedent's personal representative brought a wrongful death claim against Oglebay under the Jones Act. The parties consented to having a magistrate enter a binding judgment with direct appeal to the court of appeal. After settling the suit, Oglebay brought an indemnity claim against the dock owner for the amount of settlement and litigation expenses. *Id.* at 362-63. The magistrate allowed Oglebay to receive contribution from the dock owner for 25% of the settlement and litigation expenses. *Id.* at 364. In reversing the judgment, the Sixth Circuit only addressed the negligence claim – the issues of seaworthiness and no-fault liability did not appear in the court's opinion. The court of appeal applied *Ryan* indemnity to the facts of the negligence case, holding that the dock owner violated the implicit warranty of workmanlike performance and that Oglebay

was entitled to complete indemnity for damages suffered as a result of the dock owner's breach. *Id.* at 365-67.

The Second Circuit's decision also conflicts with Fourth Circuit decisions applying a *Ryan* analysis to cases involving negligence, notwithstanding the absence of no-fault liability. In *Tebbs v. Baker-Whiteley Towing Company,* 407 F.2d 1055 (4th Cir. 1969), the court of appeals applied the *Ryan* indemnity analysis to a maritime collision case between a yacht and a government barge that was being towed by Baker-Whitely. The yacht owner successfully sued the United States government as well as the towing company on a claim of negligence. The district court awarded the United States judgment on its cross-claim against Baker-Whitely for indemnification. *Id.* at 1057. Because the tug owner, like a stevedore, owed the government a warranty of workmanlike service in towing its barge, the tug owner was responsible for indemnifying the United States for damages occurring due to his negligence in towing the barge. *Id.* at 1058-1059. Therefore, the Fourth Circuit also permitted the recovery of *Ryan* indemnity in the absence of no-fault liability.

The Third Circuit has also allowed indemnification in the absence of strict liability. In *Pastore v. Taiyo Gyogyo, K.K.,* 571 F.2d 777 (3d Cir. 1978), the court of appeals reinstated a judgment against a negligent stevedore whose employees had started a fire aboard a vessel and awarded *Ryan* indemnity in favor of the shipowner on whose vessel a fireman was injured despite the shipowner having been found negligent. Although the injury arose prior to the 1972 Amendments to the LHWCA, the fireman was not a covered employee under the LHWCA and his only cause of action against the shipowner was for negligence. The Third Circuit noted that the failure of the stevedore to perform in a careful, workmanlike manner which

The Third Circuit also applied *Ryan* indemnity to a negligence action in *Cooper v. Loper*, 923 F.2d 1045 (3d Cir. 1991). In that case, a ship employee was injured while unloading a ship. Dock workers, employed by the stevedore, struck Cooper in the head with a large bucket of fish. The employee sued the shipowner under the Jones Act and "general maritime law." The district court awarded the shipowners contribution against the negligent stevedore for 80% of their settlement with the injured employee. *Id.* at 1047. The Third Circuit reversed, finding contribution inapplicable to cases involving a shipowner's right to indemnity. *Id.* at 1050. The Third Circuit applied *Ryan* indemnity in lieu of contribution. "Because the court found that the dock owner breached its duty of workmanlike service through the conduct of its employees, it should have awarded the shipowners full indemnity." *Id.* at 1050.

Contrary to Weeks' arguments before the Second Circuit, the Third Circuit in *Cooper* awarded *Ryan* indemnity despite the absence of strict liability. If an owner is not liable for unseaworthiness, the plaintiff has the burden under the Jones Act of establishing by a preponderance of the evidence that his employer's negligence was a cause, however slight, of his injuries. *Matter of Hechinger*, 890 F.2d 202, 208 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 136 (1990). Although the employee in *Cooper* could have claimed unseaworthiness, in addition to negligence, no evidence existed that the jury found the ship to be unseaworthy. To the contrary, the worker's injury was caused by the stevedore's negligence off the ship in failing to catch the bucket. Nowhere in its opinion does the Third Circuit discuss the seaworthiness doctrine, the application of strict liability, or that the jury found the vessel to be unseaworthy. Thus, the Third Circuit awarded indemnity despite the absence of no-fault liability.

The Second Circuit's decision also contradicts its own prior decision in which it affirmed a district court's granting of indemnity in a negligence case. In *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975), a longshoreman was injured while unloading A/S Ocean. Henry was standing on top of an eleven-foot pile of pontoons when cargo lines struck him in the left shoulder, knocking him overboard. *Id.* at 404. A jury found that the ship was seaworthy, that the shipowner was negligent, and that Pittson Stevedoring Company had breached its warranty of workmanlike performance. The district court then permitted the shipowner's suit for indemnity from the negligent stevedore. *Id* at 403. In affirming the granting of indemnity despite the absence of no-fault liability, the Second Circuit declared "[t]he stevedore's liability for breach of warranty does not rest upon the nature of the shipowner's liability (i.e., whether it is based upon unseaworthiness rather than upon negligence) but upon the stevedore's own contractual obligation to the shipowner." *Id.* at 406, *citing Ryan Stevedoring Co., supra*, 350 U.S. at 131-32. Although the Second Circuit's decision in this case reasoned that *Henry* only allowed indemnity for injuries arising from a shipowner's violation of his non-delegable duties, such is not apparent from a reading of the *Henry* opinion, which lacks an analysis of the interplay between *Ryan* and non-delegable duties.

The Ninth Circuit's has also denied recovery of indemnity in negligence cases by repeatedly holding that a shipowner cannot obtain *Ryan* indemnity outside the seaworthiness doctrine. *See Knight v. Alaska Trawl Fisheries, Inc.*, 154 F.3d 1042, 1046 (9th Cir. 1998) ("We hold that a negligent shipowner is not entitled to receive Ryan indemnity from a negligent contractor when the shipowner is found liable under both negligence and unseaworthiness theories."); *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836

negligent shipowner is not entitled to receive Ryan indemnity from a negligent contractor when the shipowner is found liable under both negligence and unseaworthiness theories."); *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir. 1989) ("Since Jones Act suits are based on negligence, not any absolute duty of the shipowner, the rationale for implying a warranty of workmanlike performance does not apply here."). Instead of granting indemnity, the Ninth Circuit has determined that "comparative fault principles best advance the goals Ryan attempted to achieve." *Knight*, 154 F.3d at 1046 (citation omitted).

Like the Second Circuit, the Ninth Circuit has also been inconsistent in its application of *Ryan* indemnity. In *Turner v. Japan Lines*, 651 F.2d 1300, 1304 (9th Cir. 1981), *cert. denied, sub. nom., Japan Lines v. Turner*, 459 U.S. 967 (1982), the Ninth Circuit allowed a shipowner to recover *Ryan* indemnity against a foreign non-employing stevedore whose improper loading of cargo caused injury to a longshore worker. The court reasoned that the foreign stevedore was not within the purview of the LHWCA and that *Ryan* indemnity was not barred in the case. *Id.* at 1304. Such reasoning is equally applicable to the facts in this case because Weeks is also not within the purview of the LHWCA.

The Ninth and Second Circuits' conclusion that shipowners are not entitled to indemnity from negligent non-employing stevedores in cases involving negligence conflicts with decisions of this Court and those of other courts of appeals. By clarifying the viability and scope of *Ryan* indemnity, this Court would provide guidance to the courts of appeal, as well as uniformity of decisions.

D. The Conclusion Reached by the Second and Ninth Circuits Contravenes the Purpose of Indemnification and Ignores the Continuing Necessity of *Ryan* Indemnity in Negligence Cases.

This Petition for Writ of Certiorari should also be granted because the Second and Ninth Circuits' conclusion that *Ryan* indemnity only applies to cases concerning no-fault liability contravenes the purpose of indemnification and ignores the necessity of *Ryan* indemnity in negligence cases.

Requiring Waterman to be liable for litigation costs and fees that resulted from Weeks' breach of its warranty of workmanlike performance would nullify the purpose behind *Ryan* indemnity. The stevedore's warranty of workmanlike performance survived the 1972 Amendments, *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 170 (1981). and any damages arising from this breach of warranty should fall upon the stevedore. As stated by this Court:

> [L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964). In the instant case, requiring Weeks to indemnify Waterman for litigation costs would deter Weeks from breaching its duty of workmanlike performance in

Moreover, notwithstanding the 1972 Amendments' abrogation of the seaworthiness doctrine, *Ryan* indemnity remains necessary to protect innocent shipowners from damages caused by negligent stevedores. The absence of no-fault liability does not relieve a shipowner from bearing the brunt of out-of-pocket expenses notwithstanding their innocence. In *Garracino v. Luckenbach Steamship Company, Inc.*, 333 F.2d 646, 648 (2d Cir. 1964), the Second Circuit held that a shipowner could recover attorneys' fees and expenses even if the shipowner is exonerated from fault or unseaworthiness. *accord, SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 525 (3d Cir. 1994); *Campbell Industries, Inc. v. Offshore Logistics Int'l, Inc.*, 816 F.2d 1401, 1406 (9th Cir. 1987). Such fees are awarded on the theory that the indemnitee bore a burden properly belonging to the indemnitor. *Cooper v. Loper*, 923 F.2d 1045, 1051 (3d. Cir. 1991) (holding that district court erred in not awarding attorney's fees to indemnitees in an admiralty matter). As in *Garracino* and *Cooper*, Waterman still suffered damages that Weeks should be responsible for paying as the negligent party who caused Lubrano's injuries. While Waterman successfully defended the main action, it has suffered loss, in the form of attorney's fees and expenses in the defense caused by the actions of the stevedore's employees. Because Weeks breached this warranty of workmanlike performance by negligently causing Lubrano's injuries, (App., *infra*, A2), Waterman should not be forced to pay litigation expenses in defense of a suit arising from Weeks' breach of its warranty of workmanlike performance.

CONCLUSION

For the foregoing reasons, Waterman Steamship Company respectfully requests that this Court grant the Petition for Writ of Certiorari and grant it such other and further relief to which it may be entitled.

Dated: July 30, 1999

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

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DAMIAN LUBRANO,

Plaintiff,

-against-

MEMORANDUM AND ORDER
95-CV-3642(JG)

WEEKS MARINE INC., s/h/a WEEKS OFF-SHORE CRANE COMPANY and WATERMAN STEAMSHIP COMPANY,

Defendants.

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APPEARANCES:

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JOHN GLEESEON, United States District Judge:

Damian Lubrano brought suit alleging that the negligence of defendants Weeks Marine, Inc.("Weeks") and Waterman Steamship Company ("Waterman") caused him to be injured when a piece of ice fell from the boom of Weeks' crane, striking him on the wrist and

forearm. Thereafter, Waterman asserted a cross-claim against Weeks for indemnification. For the reasons set forth below, I find that Weeks is not obligated to indemnify Waterman.

FACTS

On February 24, 1994, Lubrano, an employee of American Stevedoring, was loading cargo onto a Waterman-owned barge. To help with the loading, Waterman had rented a barge crane from Weeks. During the course of the loading job, a piece of ice fell from the boom of Weeks' crane, striking Lubrano on the left wrist and forearm. Accordingly, Lubrano brought suit against both Weeks and Waterman, claiming that the negligence of both caused the ice to fall on him, causing injury. Thereafter, Waterman asserted a cross-claim against Weeks, seeking indemnification.

After a three-day trial, a jury found that Lubrano had been injured and that his injury was the result of the negligence of Weeks and American Stevedoring, but was not the result of the negligence of Waterman. Waterman now seeks to recover the litigation expenses it incurred in defending against Lubrano's action. Waterman contends it is that entitled to indemnification because Lubrano was injured as a

result of Weeks' breach of an implied warranty of workmanlike performance.

DISCUSSION

The implied warranty of workmanlike performance, "one of the most ambiguous and controversial concepts in all of admiralty law,"[1] was created by the Supreme Court in the landmark case of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). Under Supreme Court precedent prior to the holding in Ryan, longshoreman "not only . . . were entitled to compensation benefits, they [also] could recover from vessel owners under the doctrine of unseaworthiness, a species of liability without fault." 1 Schoenbaum, supra note 1, § 5-8, at 190 (footnote omitted). By contract, "a vessel owner who was liable for unseaworthiness could [not] recover in contribution from a negligent stevedore." Id. Accordingly, in those instances where the longshoremen was injured as a result of the actions of his employer (the stevedore), the vessel owner was placed in an "unenviable position": "A longshoreman might be injured as a result

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[1] 1 Thomas J. Schoenbaum, Admiralty & Maritime Law § 5-8 at 192 (2d ed. 1994).

of an unseaworthy condition caused wholly by the stevedore's negligence, and yet the shipowner, wholly without fault, could be held liable for the entire amount of compensatory damages." Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252, 1255 (2d Cir.), cert. denied, 423 U.S. 838 (1975).

In Ryan, the Supreme Court attempted to remedy the unfairness. It held that contracts between vessel owners and stevedoring companies contain an implied warranty of workmanlike performance, and that, when a shipowner is liable to an employee for failing to supply a seaworthy vessel, it is entitled to indemnification from a stevedore that caused the unseaworthy condition.[2] See Ryan Stevedoing Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Gabourel, 1996 WL 447991, at *1. Thus, after Ryan, those shipowners who were forced to pay a judgment to an injured longshoreman as a result of an unsafe condition created by a stevedore could thereafter recover from that stevedore under a theory of

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[2] "The obligation to indemnify includes (litigation expenses incurred by the shipowner in defending any suit brought against him as result of the such a breach'" Gabourel v. Bouchard Transportation Co., No. 94 civ. 5897 1996 WL 447991, at *1(S.D.N.Y. Aug. 7 1996).

indemnity. This liability scheme has been called a "round robin" : upon being injured, a longshoreman would bring suit against the shipowner, who, upon being found liable, would seek indemnity from the longshoreman's employer, the stevedore. See 1 Shoenbaum, supra note 1, § 5-8, at 192.

Congress changed this system with its 1972 amendments to the Longshore and Harbor Worker's Compensation Act ("LHWCA"). In passing the 1972 amendments. Congress (1) "provide[d] that shipowners can be held liable to longshoremen only for negligence, and not for unseaworthiness," Fairmont, 511 F.2d at 1258 n.8; and (2) "provided that the stevedore employer 'shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void,'" 1 Schoenbaum, supra note 1. § 5-8, at 192.

Thus, in this case, Waterman (the shipowner) would have been precluded from seeking indemnification from American Stevedoring, the plaintiff's employer. However, it seeks indemnification from Weeks, which did not employ plaintiff. The question presented is whether it may obtain such indemnification even though Congress has

eliminated the prospect of shipowners being held liable without fault.

In seeking indemnification, Waterman argues that the 1972 amendments overruled Ryan only to the extent that Ryan allowed shipowners to seek indemnification from employing stevedores, and not the extent that Ryan provided for the indemnification of shipowners by non-employing stevedores. In support of this argument, Waterman relies on the holding in Rindone v. Aryan National Shipping Co., 1980 AMC 196, 1979 U.S.Dist. LEXIS 14968 (S.D.N.Y. 1979). In that case, the court found that the injuries of the plaintiff, a longshoreman, had been caused not by the negligence of the shipowner, but rather by the negligence of a stevedore that did not employ the plaintiff. The court went on to find that the negligent stevedore was obligated to indemnify the shipowner for the costs it had incurred in defending against the action. See id. at *7. In so ruling, the court reasoned that the 1972 amendments did not, "by [their] own force cut[] off the availability of pre-1972 indemnification to a vessel by a stevedore who did not employ the injured party." Id. at 7.

In response to Waterman's claim for indemnification, Weeks contends that the rationale underlying Ryan has no application where

the shipowner has not been exposed to liability without fault. Weeks notes that, in this case, the plaintiff sought to hold Waterman liable under a theory of negligence, not pursuant to the doctrine of unseaworthiness. Because Lubrano did not seek to hold Waterman liable without fault, Weeks maintains that it would be inappropriate to apply the warranty of workmanlike performance to these facts.

I agree. As the Second Circuit has held, the Ryan indemnity doctrine is appropriate only where the following elements are present:

> [A] shipowner, relying on the expertise of another party (the contractor), enters into a contract whereby the contractor agrees to perform services without supervision or control by the shipowner; the improper, unsafe or incompetent execution of such services would foreseeable render the vessel unseaworthy or bring into play a pre-existing unseaworthy condition; and the shipowner would thereby be exposed to liability regardless of fault.

Fairmont, 511 F.2d at 1258 (footnotes omitted); see also Gabourel, 1996 WL 447991, at *1. According to the Second Circuit, where the foregoing elements are present, "there will be implied in the contract an agreement by the contractor to indemnify the shipowner for any liability it might incur as a result of an unseaworthy condition caused

or brought into play by the improper, unsafe or incompetent performance of the contractor." Fairmont, 511 F.2d at 1258.

In the instant case, Lubrano did not seek to hold Waterman liable under the doctrine of unseaworthiness. Indeed, under the 1972 amendments to the LHWCA. Lubrano could not have proceeded against Waterman under that theory: as already stated those amendments abolished the longshoremen's right to sue the shipowner on a theory of unseaworthiness.[3] Accordingly, Waterman was not faced with the possibility of being held liable without fault. Under the

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[3] With the exception of Rindone, with which I disagree, the cases cited by Waterman, all imposed Ryan indemnity either (1) where the shipowner was being held liable under the doctrine of unseaworthiness, see In re Joint Eastern & Southern District Asbestos Litigation, 129 B.R. 710, 789-90 (S.D.N.Y. 1991) ("Plaintiffs base liability upon the contention that the vessels were in an unseaworthy condition as a result of the presence of asbestos-containing products on board."), judgment vacated by 982 F.2d 721(2d Cir. 1992), opinion modified on rehearing by 993 F.2d 7 (2d Cir., 1993); or (2) where, because the injured party was a seaman, not a longshoreman, his cause of action was unaffected by Congress's 1972 abolition of the doctrine of unseaworthiness with respect to the longshoremen, see Cooper v. Loper, 923 F.2d 1045, 1047 (3d Cir. 1991) (stating that plaintiff was an employee of the shipowner); Oglebay Norton Co. v. CSX Corp., 788 F.2d 361, 363 (6th Cir.) (describing injured party as a seaman), cert. denied, 479 U.S. 849 (1986); see also 1 Schoenbaum, supra note 1, § 5-8, at 194-98 (comparing application of Ryan indemnity in cases where shipowner was sued by longshoremen and application of that doctrine in cases where shipowner was sued by seaman).

holding in Fairmont, Waterman is not entitled to indemnification. Its cross-claim therefore is denied.

CONCLUSION

For the reasons set forth above, Waterman's cross-claim for indemnification is denied.

So Ordered.

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John Gleeson, U.S.D.J.

Dated: May 19, 1998
Brooklyn, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: January 26, 1999 Decided: April 30, 1999)

Docket No. 98-7849

DAMIAN LUBRANO,
Plaintiff

-v-

WATERMAN STEAMSHIP COMPANY,
Defendant-Appellant,

WEEKS MARINE, INC. sued here as WEEKS OFF-SHORE CRANE COMPANY,
Defendant-Appellee,

BAY CRANE CO., INC., JOHN DOE (1-10) and XYZ INC. (1-10},
Defendants.

Before:

NEWMAN, WALKER, and CALABRESI,
Circuit Judges.

The appellant, a shipowner, appeals from a decision of the United States District Court for the Eastern District of New York (John Gleeson, *Judge*) denying its cross-claim against the appellee, a stevedore, for indemnification of the costs that the appellant incurred

in defending against the plaintiff long-shoreman's suite for injuries he received while loading the appellant's vessel.

Affirmed.

MICHAEL E. UNGER, of counsel, De Orchis, Walker & Corsa, LLP (LeRoy S. Corsa, of counsel, on the brief), New York, N.Y., *for Defendant -Appellant Waterman Steamship Company.*

MICHAEL N. COTIGNOLA, New York, N.Y., *for Defendant-Appellee Weeks Marine, Inc.*

CALABRESI, *Circuit Judge:*

This case presents the issue of whether a shipowner who successfully defends against a suit by an injured longshoreman may recover its litigation costs from a stevedore[1] who caused the longshoreman's injuries and who is not the employer of the longshoreman (hereinafter the "nonemploying stevedore"). The district court held that an obligation to indemnify is not an implied term of the contract between a shipowner and a stevedore. We agree, and affirm the district court's decision.

BACKGROUND

On February 24, 1994, plaintiff Damian Lubrano, who worked as a Longshoreman for American Stevedoring, was loading a barge owned by defendant-appellant Waterman Steamship Company

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[1] A stevedore is a marine contractor who loads and unloads ships in port.

("Waterman"). Waterman had rented a crane from defendant-appellee Weeks Marine, Inc. ("Weeks")-- the stevedore whose liability is at issue in this case--for the the purpose of loading its barge. A piece of ice fell from the Weeks crane and stuck Lubrano on the left wrist and forearem.

The Longshore and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S. C. §§ 901-950 (1994), prevented Lubrano from recovering anything more than workers' compensation benefits from American Stevedoring. See id § 905(a). The LHWCA allows recovery, however, against negligent shipowners and any other party (except the employer responsible for a covered employee's injury. See id. §§ 905, 933. Accordingly, Lubrano brought suit against Waterman and Weeks, alleging that their negligence had caused his injuries. Waterman asserted a cross claim for indemnification.

At the conclusion of trial, a jury found that Weeks, but not Waterman, had negligently caused Lubrano's injuries.[2] Waterman sought to recover its litigation expenses from Weeks, and the district court denied indemnification. See Lubrano v. Weeks Marine, Inc., No. 95-cv-3642, 1998 WL 765135 (E.D.N.Y. May 19, 1998).

DISCUSSION

Can a shipowner who successfully defends against a suit by an injured longshoreman recover its litigation costs from a nonemploying stevedore who caused the longshoreman's injuries?[3] On the basis of Second Circuit precedents, the answer to this question is clearly "no."

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[2] Lubrano's employer, American Stevedoring, also was found negligent buy, as noted above was protected by the LHWCA from liability and therefore had not been named as a defendant in the suit.

[3] Congress has expressly precluded such recovery by a shipowner against a stevedore who is the employer of the longshoreman (hereinafter "the employing stevedore"). See 33 U.S.C. § 905(b) (1994).

The path to this conclusion is tortuous, however, and merits explication.

A.

In 1946, the Supreme Court held that longshoremen who were injured by a dangerous or defective condition aboard a vessel on which they were working could recover from the vessel's owner on the theory that the owner had breached its implied warranty of the seaworthiness of the ship. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 99-102 (1946). Later, the Court established an implied warranty of workmanlike performance, which held that a stevedore who contracted with a shipowner implicitly promised that it would perform its services competently and safely. *See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 130-31 (1956). At the same time, the Court read the contract between the shipowner and the stevedore to give the shipowner and implied right of indemnification against the stevedore for damages sustained as a result of any breach of this warranty. *See id.* at 130. To decide the case before us, we must consider the continued viability of this so-called "*Ryan* indemnity" in light of our precedents since *Ryan*.

In *Fairmont Shipping Corp. v. Chevron International Oil Co.*, 511 F.2d 1252 (2d Cir. 1975), we stated that Ryan indemnity applied only in cases in which a contractor rendered its services to a shipowner in a way that exposed the shipowner to strict liability (for example, under the doctrine of seaworthiness) and did not apply to situations (like the one currently before us) in which the shipowner would be liable, if at all, only in negligence. *See id.* at 1257-58 & n.8. But this statement, although expressed unequivocally and after are fully reasoned analysis, was made in dicta.[4] As such, even though the

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[4] Specifically, we made the observation only by way of distinguishing the contractor's warranty of workmanlike performance, which was involved in *Fairmont Shipping*, from a shipowner's right of indemnity against the contractor, which was not. *See id.* at 1259.

language of *Fairmont Shipping* directly covers the case now before us, *Fairmont Shipping* does not bind us.

Two years later, however, we ruled that a shipowner had no right of indemnification against the owner of a fuel barge that allegedly caused a fire while fueling the owner's vessel. *See Navieros Oceanikos, S.A. v. S.T. Mobil Trader*, 554 F.2d 43, 44-47 (2d Cir. 1977). Citing *Fairmont Shipping*, we held that *Ryan* indemnity was not available because the shipowner seeking indemnification had not been exposed to liability without fault. *See id.* at 46-47. *Navieros Oceanikos* thus made the dictum in *Fairmont Shipping* into the binding precedent of this Circuit.

In the instant case, Lubrano sued Waterman only in negligence.[5] Accordingly, if the rule we stated in *Fairmont Shipping* and *Navieros Oceanikos* applies to the facts before us, we are bound to affirm the district court's decision disallowing Waterman's indemnification claim. If, instead, *Ryan* indemnity still obtains, then Waterman is entitled to recover its litigation costs from Weeks. This is because in *Massa v. C.A. Venezuelan Navigacion*, 332 F.2d 779 (2d Cir. 1964), we held that *Ryan* indemnification applies to compensate shipowners for the costs of successfully defending against suits brought by longshoremen injured by a stevedore's breach of its contractual duties to the shipowner. *See id.* at 782.

Whether the *Fairmont Shipping-Navieros Oceanikos* rule applies depends on whether *Navieros Oceanikos* can and should be distinguished from the situation before us. The factual contexts of the two cases do differ. *Navieros Oceanikos* involved a claim for property

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[5] Congress abrogated the longshoreman's right to recover from a shipowner for breach of the warranty of seaworthiness in 1972, thereby eliminating liability without fault from the shipowner-longshoreman relationship. *See* 33 U.S.C. § 905(b) (1994); *see also Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156, 172 (1981) (reading § 905(b) to bar suits based on a shipowner's vicarious liability arising out of its non-delegable duty).

damage by a shipowner against a bunkering contractor, and the instant case involves personal injury. But nothing in our reasoning in *Fairmont Shipping* or *Navieros Oceanikos* indicates that this distinction mattered at all to the courts in these cases.[6] Nor do we see a basis for making such a differentiation in deciding whether to imply an indemnification agreement into a contract. We therefore affirm the district court's ruling that Weeks had no obligation to indemnify Waterman.

B.

The *Fairmont Shipping-Navieros Oceanikos* rule means that *Ryan* indemnity is virtually dead, at least in this Circuit.[7] How this came to be, and in particular how it happened that a Supreme Court doctrine that was neither abrogated nor expressly overruled came no longer to apply, is a long and tortured tale. Nevertheless, we believe that we owe it to the litigants to explain how this point was reached. The answer, in short, is that by the time we decided *Fairmont Shipping* and *Navieros Oceanikos* in the mid-1970s, the legal relationship among longshoremen, shipowners, and stevedores had come to differ fundamentally from what it had been when the Supreme Court established and developed the concept of *Ryan* indemnity in the 1950s

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[6] Indeed, that the *Fairmont Shipping* and *Navieros Oceanikos* courts held bound to discuss *Ryan*-a personal injury case-even though their cases involved property damage suggests the absence of a relevant distinction between the two contexts.

[7] *Cf.* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5-8, at 194-99 (2d ed. 1994) (reviewing the relevant case law and concluding that *Ryan* indemnity survives in cases involving "privately employed longshoremen and harbor workers injured outside the territorial coverage of the LHWCA" and, in some circuits, even in cases involving personal injuries to seamen who are injured due to the conduct of a stevedore or other contractor); *cf. also infra* note 10 (noting the unresolved issue of whether a non-shipowner may seek *Ryan* indemnity from an employing stevedore).

and 1960s. These changes in the legal relations made it unlikely that the shipowner and stevedore would have intended a duty to indemnify. Accordingly, such indemnity was no longer appropriately implied into the shipowner-nonemploying stevedore contract. *Cf. Great Lakes Transit Corp. v. Marceau*, 154 F.2d 623, 628 (2d Cir. 1946) (L.Hand, *J.*, concurring) (noting that the task of courts in construing implied terms of a contract is to determine what the parties would have intended if they had explicitly considered the issue).

1.

The LHWCA, like most other workers' compensation systems in the United States, has always immunized employers covered by the Act from suit by their injured employees. In return for this protection, the employers incurred an obligation to compensate their employees for occupational injuries according to a statutorily prescribed scheme. *See* 33 U.S.C. § 904 (a) (establishing the employer's liability for compensation); *id.* § 905(a) (immunizing employers against liability to injured employees other than under the statutory compensation scheme); *see generally* Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 Harv. L. Rev. 1641, 1643 (1983) ("These limited [statutory] benefits are the exclusive remedy for injured workers against their employers. Employer immunity from tort actions for work-related injuries has frequently been deemed the quid pro quo that turn-of-the-century employees granted in exchange for the statutory guarantee of swift and certain compensation." (footnotes omitted)).

As originally enacted, however, the LHWCA did not preclude longshoremen from bringing a workplace injury suit against persons or entities other than the longshoremen's employers. Thus, in 1946, the Supreme Court held that longshoremen could recover from a shipowner

under the warranty of seaworthiness[8] if they were injured by a dangerous or defective condition aboard the owner's vessel. *See SeasShipping Co.*, 328 U.S. at 89-100. The Court also ruled more generally that the LHWCA had not affected any of a longshoreman's common law rights against an owner of a vessel on which the longshoreman was injured (unless the owner also happened to be his employer). *See id.* at 101-02. In the wake of *Seas Shipping Co.*, therefore, shipowners could be liable to injured longshoremen not only for negligence but also strictly for any breaches of the implied warranty of seaworthiness.

Although the LHWCA's exclusive remedy rule protected stevedores from liability (in excess of the statutory compensation) to their injured employees, it offered no immunity to shipowners against suits brought by the stevedore's longshoremen. As a result, when an employing stevedore caused a shipowner to breach its warranty of seaworthiness--for example, by improperly stowing cargo--the shipowner could be held wholly liable, even though without fault, while the perhaps-negligent stevedore's liability would seemingly be limited to the statutory compensation.

Not surprisingly, such fault-free shipowners who found themselves liable to injured longshoremen sought to recovery (through indemnification or contribution) from the stevedores who had caused the injuries. In 1952, however, the Supreme Court ruled that a shipowner held liable to an injured longshoreman had no right of contribution from the longshoreman's employing stevedore. *See Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 287 (1952). Having rejected a shipowner's claim to a right of

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[8] The warranty of seaworthiness originally applied to seamen who worked directly for the shipowner. *See The Osceola*, 189 U.S. 158, 175 (1903). In *Seas Shipping Co.*, the Supreme Court held that the warranty did not arise solely out of the employment contract between a seaman and shipowner, but rather extended to all persons working on a shipowner's vessel "with this consent or by his arrangement." 328 U.S. at 95.

contribution against negligent stevedores, the Supreme Court, four years later in *Ryan*, endorsed a right of *indemnification* in a very similar situation.

As noted above, *Ryan* read a warranty of workmanlike performance into the shipowner-stevedore contract. It then implied a right of indemnification by the shipowner against the stevedore for damages caused by the stevedore's breach of warranty. *See* 350 U.S. at 130-31. Because the warranty gave rise to liability in contract, the Court reasoned that an indemnity action by a shipowner against a stevedore was neither barred by the LHWCA, *see id.* at 128-32, nor by *Halcyon Lines'* prohibition against contribution actions in tort.

In 1973, the Court resurrected contribution claims by shipowners against nonemploying stevedores form their apparent death in *Halcyon Lines*. In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court allowed a shipowner sued by an injured longshoreman to seek contribution form the nonemploying stevedore whose negligence had caused the longshoreman's injuries.[9] In so doing, the Court construed *Halcyon Lines* narrowly, noting that "[d]espite the occasional breadth of its dictum," *Halcyon Lines'* prohibition against contribution claims should be confined to claims against employing stevedores. *Id.* at 111, 113. The concern that animated *Halcyon Lines*, according to the Court, was the desire to

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[9] The Court expressly declined "to determine whether contribution in cases such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of fault of the parties." Id. at 108 n.3; *cf. Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 33 (2d Cir. 1980) (affirming the district court's allocation of liability between a shipowner and nonemploying stevedore based on the relative fault of the parties). The Supreme Court similarly declined to say whether the 1972 amendments to the LHWCA would have affected the outcome of the case if they had applied. *See Cooper Stevedoring*, 417 U.S. at 107 n.1. The amendments did not apply because the longshoreman filed his suit against the employer before 1972. *See id.*

avoid creating a circuitous route to *employer* liability that would have undermined "Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy." *Id.* at 112-13. "[W]hatever weight these factors were properly accorded in the factual circumstances presented in *Halcyon*," the Court continued, "they have no application [in a case involving a claim against a nonemploying stevedore]." *Id.* at 113.

2.

Cooper Stevedoring's view of *Halcyon* was consistent with Congress' 1972 amendments to the LHWCA. Those amendments--which did not apply to *Cooper Stevedoring*--had expressly relieved *employing* stevedores from the indirect liability for their employees' injuries that *Ryan* indemnity had imposed. They did not speak directly, however, to *Ryan* indemnity as against *nonemploying* stevedores.

The amendments provided in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b)

The language of § 905(b) refers only to the "vessel" and the

"employer." *Cf.* Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul L. Rev. 1165, 1187-88 (1981) ("[Section 905(b)] applies, however, *only to covered employees* and, therefore does not grant an immunity from indemnity or contribution to anyone other than those specified in the amendment. . . .Moreover, other than section 905(b), there is no statutory restraint on indemnity or contribution claims in maritime law."). And the Supreme Court has described the amendments in relatively narrow terms:

> The intent and effect of this amendment were to overrule this Court's decisions in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer.

Cooper Stevedoring, 417 U.S. at 113 n.6. Accordingly, it would be incorrect to say that the 1972 amendments to the LHWCA *directly* abrogated *Ryan* indemnity against nonemploying stevedores.[10]

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[10] Courts are in conflict as to whether *Ryan* indemnity by a non-shipowner against an employing stevedore survived the 1972 amendments. Courts that have denied indemnity in such situations have cited § 905(b)'s intent to immunize employing stevedores from third-party litigation. *See, e.g., Oman v. JohnsManville Corp.*, 482 F. Supp. 1060, 1072 (E.D. Va. 1980); *Spadola v. Viking Yacht Co.*, 441 F. Supp. 798, 802-03 (S.D.N.Y. 1977). Courts that have upheld indemnity have looked to the intent of the parties, as evidenced by their particular contractual arrangement. *See, e.g., Olsen v. Shell Oil Co.*, 595 F.2d 1099, 1104 (5th Cir., 1979). When we were confronted with this issue, we noted that "[g]iven the clear statutory language and the absence of legislative history at variance with it, we would hesitate to hold that § 905(b) by its own forces cuts off the availability of *Ryan* indemnity to a non-vessel in all cases where the concurring negligence of a stevedoring

But this did not mean that the amendments had no bearing on the question of whether *Ryan* indemnity survived the 1972 changes. The amendments affected the interrelationship among longshoremen, shipowners, and stevedores in another fundamental way: they expressly discarded the warranty of seaworthiness as a basis for holding shipowners liable to longshoremen. And, although the legislative history of the amendments makes clear that Congress considered its addition of § 905(b) to eliminate *Ryan* indemnification only against a covered employer, that same history also expresses a more general belief that, by eliminating strict liability under the seaworthiness doctrine, the amendments removed the need for *Ryan* indemnification altogether.[11] *Cf. Smith & Kelly Co. v. S/S Concordia TADJ*, 718 F.2d

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company has caused injuries to the latter's employees." *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 721-22 (2d Cir. 1978). We resolved the case without deciding the issue, however, because we found that, in the particular case, no *Ryan*-like intent to indemnify could be implied between the paties. *See id.* at 722.

[11] The House Committee report said this about the relevant portions of the amendments:

> The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance [,] is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negeligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.
>
> Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superio economic strength could circumvent and nullify the provision of Section 5 of the Act by

1022, 1027 n.4 (11th Cir. 1983) ("[W]e view the 1972 Amendments as casting doubt on the continued vitality of the *Ryan* indemnity principle.").

It is not surprising, therefore, that our own cases, after 1972, deemed the existence of strict liability essential to *Ryan* indemnity. See, e.g., *Fairmont Shipping*, 511 F.2d at 1257-58 (stating in dicta that *Ryan* indemnity is available only if a contractor exposes the shipowner to strict liability); *Navieros Oceanikos*, 554 F.2d 46 (relying on the *Fairmont Shipping* dictum). Indeed, even before the 1972 amendments, we had posited the central role of strict liability to such indemnity. *See Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270, 276 (2d Cir. 1968) ("[A]ny equitable considerations underlying the decision of courts to require indemnity by applying the implied warranty of workmanlike service are ultimately derived from a shipowner's liabilities under the seaworthiness guarantee . . . ."); *DeGioia v. United States Lines Co.*, 304 F.2d 421, 425 (2d Cir. 1962) ("The primary source of the shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship. . . .").

3.

The problem with reading *Ryan* indemnity as contingent upon the shipowner being subject to strict liability, however, is that such a view does not entirely comport either with the Supreme Court's rationale for creating *Ryan* indemnity or with later Supreme Court cases

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> requiring indemnification from a covered employer for employee injuries.
>
> Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

H.R. Rep. No. 92-1441 (1972), *reprinted* in 1972 U.S.C.C.A.N. 4698, 4704.

that developed the *Ryan* doctrine, albeit before the 1972 amendments. On their face, *Ryan* and its early progeny do not reflect the premised essential link between the shipowner's warranty of seaworthiness to the longshoreman and its right of indemnification against the stevedore.

In fact, *Ryan* itself did not necessarily involve strict liability. Although *Ryan* is widely described as involving a shipowner's liability for breach of its warranty of seaworthiness the injured longshoreman's suit against the shipowner had claimed liability based on both negligence and unseaworthiness, and the outcome of the trail did not reveal whether liability was founded on one or the other, or both. *See Ryan*, 350 U.S. at 127; *see also Palazzolo v. Pan Atlantic S.S. Corp.*, 111 F. Supp. 505, 506 (E.D.N.Y. 1953) (noting that the jury had been charged on both theories and returned a general verdict) *aff'd in part and rev'd in part*, 211 F.2d 277 (2d Cir. 1954), *aff'd sub nom Ryan*, 350 U.S. 124.

And *Weyerhaeuser S.S. Co. v. Nacirema Operation Co.*, 355 U.S. 563 (1958), decided two years after *Ryan*, made even more clear that at that time the Court did not consider the right to *Ryan* indemnity to depend on the basis of the shipowner's liability to the longshoreman. In *Weyerhauser*, as in *Ryan*, the longshoreman initially claimed both negligence and breach of warranty of seaworthiness. *See id.* at 564. Unlike *Ryan*, however, the jury in *Weyerhaeuser* specifically found that the shipowner, though negligent, had not breached its warranty of seaworthiness. *See id.* at 564. Yet the Court saw no problem with applying *Ryan* indemnity, and it never mentioned the possibility that the fact that the shipowner's liability was based on fault rather than strict liability might affect its right to indemnification.

It is not easy, therefore, to reconcile our statements declaring an absolute link between *Ryan* indemnity and strict liability with the language of *Ryan* and its immediate progeny. And some of our own cases, applying pre- 1972 law, took the position that, under the *Ryan* doctrine, the theory underlying the longshoreman's claim against the shipowner did not by itself determine whether or not *Ryan* indemnity was available.

For example, in *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975), we affirmed the district court's grant of indemnification by the shipowner against the employing stevedore in a situation in which (1) the shipowner acted negligently; (2) the shipowner did not breach its duty of seaworthiness; and (3) the stevedore had breached its duty of workmanlike performance to the shipowner.[12] *See id.* At 403, 406-07.

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[12] Although *Henry* was decided in 1975, the 1972 amendments did not apply--the longshoreman's injury occurred in 1966--and the shipowner's indemnification claim against the employing stevedore therefore was not precluded. *See* 512 F.2d at 404.

In rejecting the stevedore's argument that indemnification should not be allowed because the shipowner had been negligent, we stated:

> Where the shipowner's liability for violation of his non-delegable duties, whether cognizable under a theory of unseaworthiness or of negligence, is attributable to the stevedore's action or inaction in breach of his contractual obligation, the recovery of indemnity should not turn on the particular theory selected by the plaintiff as the basis of his suit against the shipowner.

Id. At 406.

Waterman relies heavily on this language to support its contention that the 1972 amendments' abrogation of the longshoreman's right to recover under the doctrine of seaworthiness did not terminate *Ryan* indemnity against nonempolying stevedores. But *Henry's* apparently broad statement is actually narrower that it appears. The statement focuses on the shipowner's *non-delegable duty liability*. Such vicarious liability makes shipowners pay, whether or not they are at fault. *Cf. Wilson v. City of New York*, 89 F.3d 32, 36 (2d Cir. 1996); *Wanswer v. Long Island R.R. Co.*, 238 F.2d 467, 470 (2d Cir., 1956). And it does so regardless of whether the independent contractor to whom the shipowner is not permitted to delegate its responsibility acted negligently or acted non-negligently but in a way that triggered that shipowner's strict liability. For this reason, the 1972 amendments, which had explicitly eliminated only the shipowner's non-fault liability for seaworthiness,

Henry founded *Ryan* indemnity on the fact that the stevedore's conduct had violated its warranty of workmanlike performance to the shipowner and in doing so had caused the shipowner to violate its duty to the longshoreman, thereby becoming liable to the longshoreman for his injuries. According to this contractually based view, whether the duty that the shipowner violated was the duty to provide a seaworthy ship or its nondelegable general duty of care to those working on its vessel was not important. In either case it was the stevedore's breach of its contract with the shipowner that gave rise to the liability.

4.

But the legal context of the relationship between the shipowner and the nonemploying stevedore has changed dramatically since *Ryan*, *Weyerhauser*, and *Henry* were decided. And these changes seemingly have led courts to read shipowner-nonemploying stevedore contracts differently-- particularly with respect to the implied terms of such contracts. As Congress noted in the legislative history to the 1972 LHWCA amendments, abrogating the right of the longshoreman to sue the shipowner under the seaworthiness doctrine removed much of the impetus for *Ryan* indemnity. More of the rationale of *Ryan* was undercut when the Supreme Court held that the 1972 amendments also eliminated a shipowner's vicarious liability for a stevedore's negligence that violated a previously nondelegable duty. "[T}he shipowner," the Court held, "has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Scindia Steam Navigation*, 415 U.S. at 172. Finally, since 1974, when shipowners are sued in negligence and held liable, they have been able to seek contribution against nonemploying

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were in time read also to bar shipowner liability based on a non-delegable duty. *See Scindia Steam Navigation*, 451 U.S. ast 172, *Napoli v. Transpacific Carriers Corp.*, 536 F.2d 505, 507 (2d Cir. 1976).

contractors. *See Cooper Stevedoring*, 417 U.S. at 113.[13]

Each of these developments in the law made it less likely that shipowners and nonemploying stevedores would have chosen--had they considered the matter--to contract for indemnification. Accordingly, these changes made it less appropriate for courts to imply terms of indemnification. *Cf. Great Lakes Transit Corp.*, 154 F.2d at 628 (L.Hand, *J.*, concurring) ("As has been so often said in like situations, the parties had no actual intent whatever; and what we do when we impute to them an implied intent, is to determine, as well as we can, how they would have provided for the occassion which as arisen, if it had been presented to them.").[14]

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[13] Both *Fairmont Shipping* and *Navieros Oceanikos* reflect the link between the availability of contribution and the implication of a duty to indemnify.

Thus, in *Fairmont Shipping*, we stated, "*Ryan* was the culmination of a series of cases involving the interlocking relationships among shipowners, stevedoring companies and longshoreman, and must be read with that backdrop in mind." 511 F.2d at 1255. One of the key elements of this backdrop, we noted, was *Halcyon Lines*', holding that shipowners could not pursue contribution against stevedores. *See id.*

And in *Navieros Oceanikos*, the district court had allocated liability for the damage to the vessel between the shipowner and contractor in proportion to their relative fault--an outcome analogous to contribution under a comparative negligence paradigm. *See* 554 F. 2d at 44. We refused to imply a contractual term of indemnification that would have superseded this loss allocation. *See id.* at 46. It is reasonable to infer from our decision that our unwillingness to imply a duty to indemnify stemmed at least in part from the availability of an alternative (and, in many ways, more sophisticated) loss allocation mechanism.

[14] The fact that Judge Mansfield, the author of *Henry*, also sat on the panels that decided *Fairmont Shipping* and *Navieors Oceanikos*, and concurred in the relevant portions of those opinions, corroborates the conclusion that *Henry*, *Fairmont Shipping*, and *Naviaeros Oceanikos* are fully compatible. *See Fairmont Shipping*, 511 F.2d at 1261 (Mansfield, *J.*, dissenting on other grounds) ("[The majority's] thorough and scholarly analysis of the historical developments

CONCLUSION

Our review reveals two diffrent explanations of *Ryan* indemnity: one based on equitable considerations and one based on contract priniciples. The theory of *Ryan* indemnity that looked to equitable concerns, as expressed in *Fairmont Shipping* and *Navieros Oceanikos*, posited that shipowners exposed to strict liability--or to vicarious liability under a nondelegable duty theory--for damages cuased by contractors should be able to get reimbursement from the contractors. This made particular sense at the time *Ryan* was decided, because shipowners who were strictly liable for unsafe conditions on their ships had no right of contribution against contractors that caused unsafe conditions. According to this view, *Ryan* indemnity was needed to remedy the unfairness of this situation. The theory of *Ryan* indemnity that relied on contract principles, as set forth in *Henry*, asserted that courts should read loos-allocation provisions--specifically, indemnification--into contracts between shipowners and stevedores.

But our review also suggests that while these two explanations of *Ryan* indemnity relied on different grounds, they did not really conflict. In fact, the equity-based view and the contract-based view are best read in tandem. The key to reconciling the two perspectives is recognizing that *Ryan* indemnification was a judicially created doctrine. Courts implied a term of indemnification into the shipowner-stevedore contracts as a reasonable approximation of the parties' intent within a particular context--a context (1) in which a contactor's defective performance could expose the shipowner to liability for injuries caused by that defective performance regardless of whether the shipowner was at fault for the injury, and (2) in which noncontractual loss allocation mechanisms--like contribution--were unavailable.

The end of shipowner strict liability and the availability of

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of the *Ryan*-type warranty demonstrates that we are not here confronted witch such an indemnity . . . ."); *Navieros Oceanikos*, 554 F.2d at 48 (Mansfield, *J.*, concurring in part and dissenting in part).

contribution as an alternative to indemnification made reading a covenant to indemnify into the shipowner-stevedore contract no longer seem approproate, either to the House Committee that proposed the 1972 amendments to the LHWCA, or to this court in *Fairmont Shipping* and *Navieros Oceanikos*. Acoodingly, in the absence of an express indemnification clause to the contrary, the contract between a shipowner and a nonemploying stevedore does not obligate the stevedore to indemnify the shipowner for the shipowner's liability to an injured longshoreman. It follows that Weeks does not have to indemnify Waterman for its litigation costs expended in successfully defending against Lubrano's suit. The decision of the district court is therefore AFFIRMED.